IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO GCR ORDER 53

G0236 | 2010

AND IN THE MATTER OF:

RICHARD ROBERT HURLSTON

V.

CAYMAN ISLANDS SUMMARY COURT

NOTICE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

This form must be read together with Notes for Guidance obtainable from the Grand Court.

TO:- The Honourable Attorney General of the Cayman Islands
Government Administration Building, Elgin Avenue
George Town, Grand Cayman, Cayman Islands

Applicant: RICHARD ROBERT HURLSTON

Respondent: CAYMAN ISLANDS SUMMARY COURT

Judgment, order, decision or other proceeding in respect of which relief is sought:

Decision dated 26 May 2010 of the Respondent, following a Preliminary Inquiry, to commit the Applicant to stand trial in the Grand Court of the Cayman Islands on charges of abduction, keeping a person in confinement and blackmail.

Relief Sought:

1. In respect of the Respondent's decision hereinbefore particularised, the Applicant seeks an Order of Certiorari quashing the said decision;

2. An Order that the Respondent do pay the Applicant's costs, in any event and forthwith.

Name and address of Applicant's Attorneys, or, if no Attorneys acting, the address for service of the Applicant:

Stuarts Walker Hersant
4th Floor, Cayman Financial Centre
36A Dr. Roy's Drive
George Town
Grand Cayman
Cayman Islands

Signed:

Stuarts Walker Hersant

Dated: 17 June 2010

GROUNDS ON WHICH RELIEF IS SOUGHT

INTRODUCTION

1. The Applicant is a Cayman Islands national who was arrested and on 6 April 2010 charged for the offences of abduction, keeping a person in confinement and blackmail.

2. On 17 March 2010, at or around 3 pm in the afternoon the virtual complainant, Mr Talbert Tyson Tatum, received a phone call from an unknown man (X) concerning Mr Tatum's interest in purchasing two wave runners. X never gave his name and never offered any further information concerning his identity. A meeting was scheduled between Mr Tatum and X that day but never came to fruition.

3. On 18 March 2010, X again contacted Mr Tatum and they arranged to meet outside Driftwood Bar in East End. Upon arriving at that location, Mr Tatum meet an individual who introduced himself as 'Robert' who claimed to be the person previously identified herein as X. Mr Tatum, along with Robert, travelled towards the Rum Point Kaibo area of the East End district to a house which was identified by Robert as his home.

4. On entering the premises with the intent to inspect the two watercraft, Mr Tatum encountered two other men. These men, along with Robert, repeatedly struck and eventually subdued Mr Tatum while concurrently making threats. His mobile phone, along with other items, were taken by his abductors. On the evidence of Mr Tatum, he was told that he was being held for ransom and that he was one of three people on their list; the others being his brother in law, the Applicant and the Applicant's younger brother, Douglas Hurlston. Again on his evidence, they went on to say that they intended to kill the Applicant; an intent which was expressed to Mr Tatum on several occasions during the period of his confinement.

5. Thereafter, Mr Tatum was made to telephone his mother, Mrs Angelica Tatum. On the evidence of Mrs Tatum, her son's phone was given to her by the Applicant and it was on this phone that the abductors contacted her. It is Mrs Tatum's evidence that on doing so, the Applicant appeared frightened. Mrs Tatum was told by the abductors that the ransom for her son was some CI$500,000 and that Mr Tatum would be killed if any contact was made with the police.

6. Mr Tatum's evidence is that on 19 March 2010, he was left alone in the house by his abductors at which time he effected his escape. He then telephoned his mother to let her know he had escaped, returning home shortly thereafter.

7. The police conducted their investigation and questioned the Applicant, along with several other individuals. From the earliest possible period, the Applicant informed the authorities that he had no knowledge of any plan to abduct and ransom Mr Tatum and that in fact, the only reason that he was compelled to comply with the requests of the abductors to convey their message and give Mr Tatum's phone to Mrs Tatum was as a result of threats to not only his life but to those of his family as well. Notwithstanding the information provided by the Applicant, the police ultimately charged 4 individuals: Wespie Mullings, Charles Sanders, Allan Kelly and the Applicant. Messrs Mullings and Sanders are currently charged under a separate indictment to that of Mr Kelly and the Applicant.

8. A long form Preliminary Inquiry pursuant to Criminal Procedure Code (2006 Revision), Section 88 was held on 25 – 26 May 2010. The Crown only sought to adduce the evidence of 3 witnesses: Mr Mullings, Mr Wright and Mrs Tatum. Mr Mullings was charged on a separate indictment with offences arising out of the incident and Mr Wright, while acknowledging that he played a role in the abduction of Mr Tatum, was not so charged. No transcript is available of the evidence given by each of these individuals, however, the writer relies upon the content and accuracy of Counsel's notes taken during the course of the hearing.

Evidence of Wespie Mullings

9. The evidence of Mr Mullings, at its essence, contends that while he was a willing participant in the abduction of Mr Tatum, it was the Applicant who was the "mastermind" behind the entire enterprise. He recounted several meetings which occurred between the Applicant and a number of other individuals (including himself) at which the operation was planned. He also recounts several failed attempts at carrying out the enterprise until it was successfully done on 17 March 2010.

10. A great majority of his evidence consisted of conversations had and acts done by him with third parties, outside of the presence of the Applicant. In fact, even on the evidence of Mr Mullings, the conduct of the entire *actus reus* of the precipitate substantive offence of abduction was undertaken outside of the presence of the Applicant and without his oversight. In fact, according to a statement made to the police dated 25 March 2010 (the

substance of which was accepted by Mr Mullings), he alleges that besides the giving of Mr Tatum's phone to the Applicant, no contact was had with the Applicant and no instructions given by or requested from the Applicant for the entire time in which Mr Tatum was held captive: a period of some 40 hours.

11. Mr Mullings did not, either in his statements to the police or during the course of his testimony, point to any independent corroborative evidence outside of his own allegations. He provided no independent evidence that the Applicant participated in the carrying out of the abduction nor did he provide any independent evidence of the Applicant's role in the subsequent actions of the abductors.

Evidence of Sylvan Wright

12. The evidence of Mr Wright is also that the Applicant was the "mastermind" behind this criminal enterprise. He too describes several meetings that took place between the Applicant and a number of others (including himself and Mr Mullings) at which the operating was planned. He, in a noticeably self interested fashion, related to the Court that he attended meeting after meeting to discuss the intended abduction, however always begrudgingly and not without protest. It was not his evidence however that his attendance was attained (at least initially) by force or compulsion but merely at the request of Mr Mullings among other.

13. In a not dissimilar fashion to that of Mr Mullings, Mr Wright's evidence is fraught with incidences of conversations had and acts done with third parties, most frequently Mr Mullings. On his own evidence, he was not directly told by the Applicant of the time and place of any of the attempts to abduct Mr Tatum, including the ultimately successful one. His contact was with Mr Mullings regarding these matters. From the day of the incident, Mr Wright never asserts that he had any contact with the Applicant. More importantly, he alleges that it was Mr Mullings who called and attempted to instruct him as to the location of the abduction, that it was Mr Mullings who called him again and enquired as to his location and that the Applicant did not inform him of or try to convince him to participate in any part of the operation after it was underway.

14. Again, the evidence provided by Mr Wright does not contain any independent corroboration for his allegations. There is no independent evidence which, circumstantially or otherwise, indicates the Applicant's participation in any of the offences as charged and more specifically the underlying offence of abduction.

Evidence of Mrs Angelica Tatum

15. The evidence of Mrs Tatum details the discussions that she had with her son's abductors and also her interactions with both the police and the bank in attempting to secure the safe return of her son.

16. The only aspect of her evidence which dealt with the Applicant is her affirmation that it was the Applicant who brought Mr Tatum's phone to her and that he relayed a message which came from the abductors that she should not call the police.

17. When questioned as to the demeanour of the Applicant at this time, she accepted that the Applicant looked frightened and that "his knees were shaking" and "his eyes were really, really red". It is respectfully contended by the Applicant that this description is entirely consistent with his position that the only reason that he agreed to relay the message and give Mr Tatum's phone to Mrs Tatum was due to threats made against lives of himself and his family. In short, the evidence of the only independent witness is to support and substantiate the Applicant's explanation for his limited involvement: that he was under duress.

18. Notwithstanding the paucity of independent evidence concerning the Applicant's involvement, the Chief Magistrate decided that there was sufficient evidence to proceed and committed the Applicant. In giving reasons for her decision, the Chief Magistrate simply stated that she believed the evidence proffered by the Crown "*in toto*".

19. For the reasons that follow, the Applicant respectfully contends that the decision to admit and accept the evidence of Messrs Mullings and Wright was erroneous. It is further contended that on the basis of this error, the decision to commit the Applicant was unlawful.

20. It is in these circumstances that the Applicant seeks permission to challenge the Respondent's decision by way of application for Judicial Review.

APPLICABLE LAW

21. In light of the afore-going, the Applicant respectfully contends that he has an arguable case with a good prospect of success thereby enabling the Grand Court to grant him leave to move for judicial review pursuant to Grand Court Rules Order 53.

22. It is further respectfully contended that there is, *prima facie*, evidence that the Respondent's decision is unlawful. Reasons for the unlawfulness of the Respondent's decision are as follows:

i. That the Chief Magistrate erred in law in admitting the evidence of Mr Sylvan Wright and Mr Wespie Mullings for the purposes of use against the Applicant;

ii. That the Chief Magistrate erred in law in holding that, on the basis of the above inadmissible evidence, that there was sufficient evidence upon which to commit the Applicant. In other words, aside from the inadmissible evidence, there was no evidence capable of supporting the decision of the Chief Magistrate;

iii. Alternatively, that the admission of the inadmissible evidence of Messrs Mullings and Wright was a substantial error that so influenced the mind of the Chief Magistrate that it led to a demonstrable injustice to the Applicant; and

iv. That the failure of the Chief Magistrate to give a properly reasoned judgment was in breach of her duty to do so and that said breach caused an in justice to the Applicant.

The Grand Court's Jurisdiction

23. As a preliminary point, it is submitted that the Grand Court has jurisdiction to judicially review committal proceedings held before the Summary Court pursuant to Section 13(2) Summary Jurisdiction Law (2006 Revision). Moreover, it is further contended that an order for certiorari is a remedy which is available to the successful applicant. This was expressly recognised in ***Neill v North Antrim Magistrates Court*** **[1992] 1 WLR 1220 at 1231**:

"That committal proceedings are in principle susceptible to judicial review is beyond doubt, and the fact that certiorari will lie in cases of procedural irregularity in such proceedings is I believe also clear."

24. The jurisdiction of the Grand Court to determine the validity of committal proceedings by way of judicial review was implicitly confirmed by the Court in ***R v Perez*** **[2009 CILR 128]** where Henderson J said:

> "At one time, the failure in a criminal proceeding to comply with a mandatory procedural requirement would have been fatal. The committal for trial would have been viewed as a nullity and the indictment set aside."[1]

25. As a consequence, were the Court to find that the decisions of the Chief Magistrate were unlawful (as it is respectfully submitted they were), the next stage in its analysis would be to determine whether the nature of those unlawful decisions were such that the Court should exercise its discretion to quash the order for committal. It is the Applicant's position that the decisions taken by the Chief Magistrate were such that it has rendered the proceedings irredeemable and that an order for certiorari should be granted.

Admissibility of Evidence

26. Given the inexplicable decision of the Chief Magistrate to give judgment in the brusque and hasty manner in which she did, it is not at all clear the basis upon which she admitted the challenged evidence. While the lack of sufficient reasons is not presently relied upon as a ground for the exercise of the Court's discretion (a matter in which the Applicant reserves his rights entirely), it has created some difficulty in the ability of the Applicant to address the issue of admissibility.

27. Notwithstanding the above, it is the Applicant's position that the admission of the evidence in question was unlawful as it was clearly hearsay and fell within no exception to the rule, recognised or otherwise. In this regard, while no transcript of the proceedings was available at the time of drafting this application, the Applicant will rely upon notes of counsel taking at the proceedings to best relay the content of the challenged evidence.

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[1] At page 131

28. The rule against hearsay is clear: "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted."[2]

29. The learned authors of *Blackstone Criminal Practice* (17th Ed.) at F15.6 state the reason for the rule succinctly:

> "At common law the hearsay rule operated rigidly to exclude evidence – including evidence of undoubted probative value – unless a specific hearsay exception could be brought to bear....In *Sharp* [1988] 1 WLR 7, Lord Havers said (at p.11) that the principal reason that led the judges to adopt the hearsay rule was the 'fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another'. Similarly, in *Blastland* [1986] AC 41, Lord Bridge of Harwich said (at p.54): 'The rationale of excluding [hearsay] as inadmissible, rooted as it is in the system of trial by jury, is recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination'."

30. It is submitted that the rationale behind this rule, whose cogency has not withered over time, is particularly relevant in the instant case.

31. Furthermore, it is equally clear that it is the responsibility of the magistrate to ensure that whatever the evidence placed before it, it is admissible under the laws of evidence as they stand. In ***R v Bedwellty Justices Ex. p. Williams*** **[1997] AC 225**, the House of Lords openly accepted this proposition. Lord Cooke, delivering the judgment for their Lordships, said this:

> "The implication is plain that, if necessary, the examining justices must consider admissibility. The duty must apply, I suggest, no matter what the ground on which admissibility is challenged before them."

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[2] *Sharp* [1988] 1 WLR 7 per Lord Havers adopting the statement in *Cross on Evidence* (6th Edition)

32. It is the Applicant's submission that the decision of the Chief Magistrate to admit the evidence of Messrs Mullings and Wright, for the purposes of proving the essential elements of the offences with which the Applicant was charged, was unlawful.

33. The starting point is that the admission of the evidence in question must be, *prima facie*, inadmissible against the Applicant, subject to it falling within defined exceptions to the rule discussed below. This is so even in cases where the charge is that of conspiracy or joint enterprise. *Blackstone*, at F16.35, puts it thusly:

> "[The rule regarding the exception] is an exception to the general rule that B is not to be prejudiced by the acts or statements of another, and an exception to the hearsay rule insofar as it may involve reliance on A's statements as evidence of their truth."

34. Such a prohibition must therefore apply *a fortiori* in this instance; where:

i. the offences charged against the Applicant are not that of conspiracy but are for substantive offences;
ii. there are no corresponding charges of conspiracy on the indictment;
iii. the witnesses on which the Crown relied were, on the Crown's own case, co-conspirators; and
iv. these co-conspirators, through the course of their evidence, sought to "point the finger" of blame at the Applicant.

35. The analogy to be drawn between this factual matrix and that in which the Crown seeks to rely upon the uncorroborated testimony of an accomplice is plain. The danger in this case is manifest as is recognised by the Court's obligation to properly instruct the jury as to this danger. Perhaps more to the point is the analogy drawn between the instant case and that of confessions made by co-defendants against each other. The motive behind testimony in all three scenarios is, taken at its lowest, questionable and, taken at its highest, *mala fides*. This is why, in particular, confessions by one defendant implicating the other can, as a rule, almost never be admissible as against the co-defendant.

36. Similarly, it is only within very narrow circumstances that the evidence of Mr Mullings (who is neither a co-defendant nor appears on the same indictment as the Applicant) and of Mr Wright (who, although admitting to partaking in the alleged offences, is not charged) would be admissible as against the Applicant. This very narrow exception was set out in

the decisions of **Tripodi v R [1961] ALR 780, R v Gray [1995] 2 Cr App R 100, R v Murray [1997] 2 Cr App R 136** and **R v Catherine Julia Willliams [2002] EWCA Crim 2208**.

37. In **Tripodi**, two witnesses were called by the Crown to prove the commission of substantive offences by the defendant. The first was T, who had plead guilty to a charge of accessory arising out of the same set of circumstances and the second M, was a participant in the series of acts in the common enterprise but was not charged. In assessing whether the evidence of the two could be properly admissible to prove the guilt of the defendant, the Court said this:

> "When the case for the prosecution is that in the commission of the crime a number of men acted in preconcert, reasonable evidence of the preconcert must be adduced before evidence of the acts or words of one of the parties in furtherance of the common purpose which constitutes or forms an element of the crime becomes admissible against the other or others..."

The Court continued:

> "...it can seldom happen that anything said by one which is no more than a narrative statement or account of some event that has already taken place, that is to say, some statement which would be receivable in evidence against the man who made it as an admission and not otherwise, can become admissible under this principle against his companions in the common enterprise."

38. In **Murray**, which considered **Gray** heavily, the Court of Appeal built upon the proposition stated in **Tripodi**:

> "Seen against that background, we are of the view that, having studied the judgment in Gray, Liggins and Others with the greatest of care, it is authority primarily for the proposition that the common law exception cannot be extended to cases where individual defendants are charged with a number of substantive offences and the terms of the common enterprise are not proved or are ill-defined."

39. The Court of Appeal in **Williams** (considering the line of cases above) perhaps stated the rule most concisely:

"We consider the authorities to which we have been referred demonstrate that acts and declarations by A done in furtherance of a sufficiently defined common enterprise are admissible to prove substantive offences committed alone in pursuit of the same common design, by B."

40. *Blackstone* treats the proposition in this way:

"The limits of the doctrine were recently considered in *Gray* [1995] 2 Cr App R 100...the Court of Appeal was inclined to the view that this state the principle too widely: the acts and declarations of a person engaged in a joint enterprise and made in pursuance of that enterprise might be admissible against another, but only where the evidence shows complicity of that other in a common offence or series of offences. **As none of the offences was alleged to have been committed jointly, the rule did not apply.**" (emphasis added)

They continue:

"In order for the act or statement of A to be admissible against B, the rule requires:

(1) that the act or statement of A must be in the course and furtherance of the common purpose; and

(2) that independent evidence be adduced of the existence of the conspiracy and the involvement in it of B."[3]

41. Accordingly, without independent evidence of the existence of any conspiracy (or joint enterprise) and of the Applicant's involvement in it, the testimony of the Applicant's alleged cohorts could not and should not have been used against him. It is submitted that there was simply no such independent evidence.

42. Outside of the inadmissible testimony of Messrs Wright and Mullings (which of course cannot be used), all that was left before the Chief Magistrate was the evidence of Miss Tatum. Her evidence, contrary to the purpose for which it was tendered by the Crown, clearly corroborates the Applicant's position. The evidence is such that she openly acknowledges that during the course of conversations with the kidnappers, threats were

[3] See also *R v Platten* [2006] Crim LR 920

made against the life of the Applicant. She further testifies that on seeing the Applicant, it was plain to her that the Applicant was gripped with fear.

43. No evidence led by the Crown, outside of the evidence of Messrs. Wright and Mullings negatived this evidence. It certainly cannot be the position of the Crown that a witness, who was offered by it as a witness of truth, is not to be believed in respect of specific parts of her evidence. It is the Crown's position either that she is to be relied upon or not.

44. On the basis that she is to be relied upon, the evidence that she does give is entirely consistent with the position of the Applicant. It must be remembered, that once the defence of duress is raised and supported on an evidential basis (which it is submitted it has), it is for the Crown to negative that assertion. In seeking to do so, the Crown is only entitled to rely upon admissible evidence. In other words, the evidence given by Messrs Mullings and Wright cannot be used so to do. If it was, it would leave the Court in an undesirable position of allowing *prima facie* inadmissible evidence to be used to render itself admissible. This would be 'bootstrapping' of the highest order and is not permitted.

45. As a result, all that we are left with is the testimony of Miss Tatum which, it is submitted, does not stand as independent evidence of the conspiracy or of the Applicant's involvement in it. What we do have is evidence demonstrative of the fact that the life of the Applicant was threatened, he suffered fear as a result of said threats and that he acted out of said fear. The elements of a conspiracy these facts do not make.

46. Therefore, for the reasons stated above, it is the Applicant's position that the evidence of Messrs Mullings and Wright tendered by the Solicitor General is inadmissible and the decision to admit said evidence by the Chief Magistrate is erroneous in law.

No admissible evidence of guilt

47. It is Applicant's primary position, that outside of the evidence that was unlawfully admitted by the Chief Magistrate, there was no evidence, sufficient or otherwise, upon which the Chief Magistrate could have properly based her decision.

48. It is patently obvious from the above recitation of the evidence before the court at the committal hearing that the ***only*** evidence providing even a *prima facie* case against the Applicant is that of Messrs Mullings and Wright. It is respectfully submitted that as a result of the aforegoing, this evidence cannot be used to prove any element of the

substantive offences with which the Applicant is charged. It is simply inadmissible for this purpose.

49. In cases such as these, the jurisdiction of the Court to quash the decision is without question. In **Ex. p. Williams (above)**, the House of Lords cited with approval the dicta of Watkins LJ in **R v Lincoln Magistrates' Court Ex. p. Field (unreported)**:

> "Before I say what I think must be said about the quality of the evidence which came before the justices, I should say that it must clearly be recognised by anyone who seeks to move this court in respect of a decision by justices to commit for trial, that an application of that kind can only succeed where there has clearly been an error of law; an error of law including, for example, where there has been a committal by justices in circumstances where it can properly be said there was **simply no evidence upon which they could exercise their power to commit a defendant for trial.**" (emphasis added)[4]

50. It is respectfully submitted, for the reasons set out above, that absent the evidence wrongly relied upon by the Chief Magistrate, the instant case falls squarely within the class of committal decision envisioned by their Lordships.

51. Accordingly, the only query left is whether the Court should exercise its discretion to grant certiorari in the present case. It is of course admitted that any remedy for the unlawful, erroneous actions by the Chief Magistrate and the consequential flawed decision thereafter is a matter for the Court in the exercise its discretion. However, it is submitted that the decision to commit has led and will further lead to a grave injustice being suffered by the Applicant.

52. It must be contrary to the rule of law and the principles of natural justice to for a citizen of a State to be made liable for committal against allegations for which there is absolutely no scintilla of credible admissible evidence against him. In fact, such a course would be in direct violation of the statutory powers invested in the Summary Court under Section 93 Criminal Procedure Code (2006 Revision) which mandates that the magistrate **must** discharge the defendant where there is no sufficient evidence tendered against him.

53. The statement of principle as set out by the Court in **Tripodi** cannot be improved upon:

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[4] At page 232

> "But when a substantive crime, not a conspiracy, is charged in the indictment it is the ingredients of the substantive crime that must be proved, not combination for a common purpose."

Accordingly, without sufficient evidence of the elements of the substantive offences with which the Applicant has been charged, the Chief Magistrate ought to have discharged him. Again, it is submitted that there was simply no such evidence before the court.

54. For the Applicant to suffer any loss of liberty based upon unfounded and unsustainable allegations is arguably the gravest injustice that he could suffer. It is argued that this would be sufficient in and of itself, without more, upon which to found an order for certiorari. However, the injustice that would arise solely out of the expense, tension and delay which the Applicant would experience awaiting trial is not to be belittled.

55. The severe injustice that would result from the acceptance of this untenable position was expressly acknowledged again by the House of Lords in **Ex. p. Williams**. Accordingly, their Lordships felt that except in the most special of cases, an order for certiorari would follow as a result:

> "For these reasons, I see no valid answer to the proposition that, under the present statute law, a committal by examining justices **can and normally should be quashed** in judicial review proceedings if there was before them no admissible evidence of the defendant's guilt."

56. This not such a case. There is no special circumstance which would mitigate the injustice that the Applicant would suffer were the Chief Magistrate's decision not be quashed. It is further submitted that if the Respondent were to allege that such special circumstances did exist, the burden so to prove would rest with it.

57. This position is echoed in the decision of the Guyanese Court of Appeal in ***Barnwell v Attorney General and another*** **(1993) 49 WIR 88**. While the case concerned the validity of removal proceedings of a sitting judge of the High Court, Kennard JA made a very useful analogy between those proceedings and that of a committal:

> "The situation in the present case can be equated to a preliminary inquiry into a criminal charge before a magistrate, where a statutory provision is not complied

with by the magistrate... **In that situation, all the proceedings from there onwards would be nullities**. (emphasis added)

It is therefore patent that, the missteps undertaken by the Chief Magistrate which (it is submitted) go beyond the scope of mere procedural irregularities, would and should be treated by the Courts as creating an inference of grave injustice warranting an order for certiorari.

58. As such, it is the Applicant's respectful submission that, for the reasons stated above, the decision made by the Chief Magistrate to order the committal of the Applicant for trial should be quashed.

Admission of evidence leading to substantial injustice

59. Were the Court to find, notwithstanding the submissions on the state of the evidence made above, that there was some evidence upon which the Chief Magistrate was entitled to properly found her decision, it is equally submitted that the admission of the evidence so influenced the mind of the Chief Magistrate that it amounted to a material irregularity in the committal proceedings which, in turn, led to a demonstrable injustice to the Applicant.

60. Again, due to the unfortunate decision of the Chief Magistrate not to give a reasoned judgment for her decision (*ex tempore* or otherwise), it is difficult to state with any certainty which matters the summary court found as conclusive in coming to the decision that it did. From the words of the Chief Magistrate herself, it would be apparent that it must have been the entirety of the Solicitor General's case, which was believed "*in toto*". However, were this not to be the case, it is submitted that given the absolute paucity of admissible evidence prejudicial to the Applicant, it is an entirely reasonable and proper inference that the Chief Magistrate relied greatly upon the challenged evidence.

61. It is further submitted that for the purposes of considering whether there was sufficient evidence to justify the decision to commit, the challenged evidence should have been treated as a nullity; as if it did not exist. However, what is clear is that it was a significant, if not the most significant, material upon which the decision was based.

62. The reliance upon inadmissible evidence to form the main plank of a committal decision was canvassed in the decision of **Neill (above)**. The dictum of Lord Mustill is of particular

insight. After acknowledging the fact that inadmissible evidence was important material founding the decision of the resident magistrate to commit, His Lordship said this:

> "[The admission of the evidence] reveals what in the vocabulary of judicial review would be called a breach of natural justice. This term has overtones which seem inappropriate to the present case. I prefer to say that as a result of a bona fide but mistaken ruling on a procedural matter **the applicant has suffered real prejudice. There has been a material irregularity in the conduct of the committal**;" (emphasis added)

63. It is submitted that in the present case, as in **Neill**, the Applicant has suffered a real prejudice. The challenged evidence is filled with allegations of conversations and acts done in concert with third parties; all outside the presence of the Applicant. Such evidence, as expressly recognised by the rationale behind the hearsay rule quoted above, is of a nature which prevents any meaningful or proper cross-examination of the maker of the statement. The Applicant had no first hand knowledge of these conversations and as a consequence, could offer no useful instruction to counsel with which to challenge this evidence. Accordingly, to use the very words of His Lordship in **Neill**, the Chief Magistrate's decision was a "material irregularity in the conduct of the committal".

64. Having established the ability of the Court to judicially review in these circumstances, again, the question becomes whether this would found a remedy of certiorari. It is submitted that, in the present case, it must.

65. The admission of the evidence was not a harmless technical error, but was an irregularity which has substantial adverse consequences for the applicant. While it is respectfully submitted that it should not, if the Court were to find that the Chief Magistrate could have sought committal on the remainder of the evidence; this matters not[5]. What is of importance is that the evidence given, weighed on the mind of the Chief Magistrate to such a degree that it is impossible to say what might have occurred were the evidence to never have been presented by the Crown.

66. The prejudice suffered by the Applicant is real and substantial. The very consequence feared as a result of the admission of hearsay evidence has been realised. The Applicant lost his right to properly challenge the evidence laid against him. He has been caused to

[5] *Neill* (above) at page 1232

suffer stress, labour and expense. Perhaps most importantly, he has been deprived of his liberty and now stands, faced with the possibility, that this injustice may continue indefinitely. It is in these circumstances that their Lordships in **Neill (above)** and in **Ex. p. Williams (above)** felt it within the power of the Court to quash the committal and it is submitted that this Honourable Court should do so as well.

Failure to give reasons

67. It is submitted that the failure of the Chief Magistrate to give adequate reasons for her decision to: (i) admit the disputed evidence and (ii) commit the Applicant, is in breach of her duty to do so and has consequently caused the Applicant to suffer a great injustice.

68. While it is recognised that as a general rule, a magistrate will not necessarily owe a distinct duty to give reasons in every regard, it is equally recognised that a duty will arise in particular circumstances on a case by case basis. It is submitted that this is such a case. In ***R v Secretary of State for Education, ex p G* [1995] ELR 58**, Latham J emphasised that while the duty to give reasons is not generally to be accepted as a free standing duty, the existence of a duty will be "dependent upon the nature of the issues involved, the basis upon which material was presented to the decision-maker, and the extent to which, in any given case, what might appear to the uninformed observer to be a statement of conclusion, will be to the person concerned with the way in which a dispute has developed, a full and sufficient explanation of the reason for the decision".[6]

69. It is submitted that the nature of the issues here, the basis upon which the material was presented and the fact that both the uninformed observer and the Applicant would regard the pronouncement by the Chief Magistrate as merely a statement of conclusion, all point to there being a duty to give proper and adequate reasons for the decision. It is equally submitted that any decision as to the existence of a duty must be seen in light of the trend of the majority of Commonwealth jurisdictions towards the acceptance of a general duty to give reasons.[7]

70. It is contended that the primary reason for the Chief Magistrate to be under a duty to give reasons for her decision for committal is that the nature of the proceedings is such that, at its conclusion, the possibility for a successful challenge of the order is limited. There is

[6] At page 67G
[7] *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300G

no direct right of appeal to the Grand Court of this decision; indeed, the avenue is by way of application for judicial review.

71. In these instances, the court has indicated that a duty is present. In ***R v Dover Magistrates Court, ex p Webb*** **[1998] COD 274**, Lord Bingham CJ indicated that while there is no general duty, such a duty is likely to arise where there is no right of appeal given to the potentially aggrieved party. Accordingly, it was of importance to know exactly upon which grounds the decision was made in order for the party to know whether the decision was one properly and lawfully made. This rationale behind the giving of reasons in cases such as this was stated in ***R v Westminster City Council, ex p Ermakov*** **[1996] 2 All ER 302**:

> "...an obligation...to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable, or invalid and therefore open to challenge."[8]

72. It is submitted that the proposition that an applicant for judicial review should be forced to undertake this onerous (and in some instances, financially prohibitive) process without the knowledge of the grounds upon which he was committed, is contrary to the principles of natural justice and inherently unfair. An archer should not be expected to do battle without an arrow in his quiver and the Applicant should not be expected to make any application without being given the ammunition with which to do so.

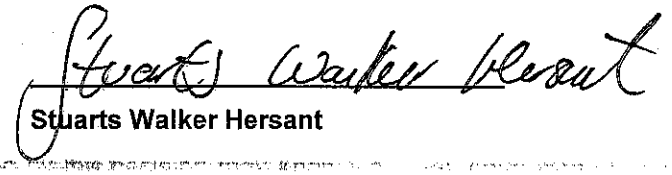
73. Accordingly, it is the Applicant's position that the failure of the Chief Magistrate to give a reasoned judgment, adequate or at all, was in breach of her duty to do so and therefore, the decision itself is susceptible to be rendered void.

74. It is further contended that the result of this breach was such to cause the Applicant prejudice in the formulation and prosecution of his appeal. As has been noted throughout these submissions, the Applicant can only hazard a guess as to the grounds upon which the Chief Magistrate either admitted the disputed evidence or ordered committal. Her belief in the Solicitor General's case is not a lawful reason for ordering the committal of the Applicant. As a result, the Applicant is left in the unfair and prejudicial position of having to argue an application with a high threshold for success in the dark. The unfairness of this position, it is submitted, warrants that the decision be quashed. This

[8] At page 309f

remedy was accepted in similar instances in the decision of ***Cedeno v Logan*** **[2001] 1 WLR 86**, where the Court held that the failure to give reasons prejudiced the ability of the Applicant to properly appeal and as a result, made an order for certiorari. The prejudice is clear in this case and accordingly, the decision of the Chief Magistrate should be rendered a nullity.

75. For all these reasons, it is the respectful application for the Applicant that he be granted leave to move for judicial review and that the Orders requested be granted.



Stuarts Walker Hersant

17 June 2010

This **NOTICE APPLICATION FOR LEAVETO APPLY FOR JUDICIAL REVIEW** was issued by Stuarts Attorneys-at-Law whose address for service is Cayman Financial Centre, Dr. Roy's Drive, P.O. Box 2510 GT, Grand Cayman, Cayman Islands.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER GCR ORDER 53

CAUSE NO. 236 OF 2010

BETWEEN:

RICHARD ROBERT HURLSTON

Applicant

-V-

CAYMAN ISLANDS SUMMARY COURT

Respondent

AFFIDAVIT OF RICHARD ROBERT HURLSTON

I, **Richard Robert Hurlston** of 32 Cinnamon Link, Bodden Town, **MAKE OATH** and say as follows:-

1. I am the Applicant herein and I swear this Affidavit in support of my application for leave to move for Judicial Review and for an Order quashing the decision of the Cayman Islands Summary Court ("**the Summary Court**") to commit me for trial in the Grand Court.

2. Insofar as the matters contained herein are within my own knowledge they are true and insofar as they are gleaned from other sources they are true to the best of my knowledge and belief.

3. I have reviewed and I have verified the contents of the Form 86A dated 17 June 2010 filed by my Attorneys pursuant to CGR Order 53 in support of the Notice of Application for leave to move for Judicial Review.

4. In the circumstances, and in reliance upon the contents of the Form 86A, I will respectfully be contending, that the Summary Court's decision to commit me for trial ("**the Decision**") following a long form preliminary inquiry is both unlawful and unreasonable.

5. For all these reasons, I therefore humbly seek the leave of this Honourable Court to move for judicial review of the Decision and to for an Order quashing the decision for my committal.

Sworn by .....

Richard Robert Hurlston

At Northward, Grand Cayman

This 22nd day of June 2010

Before me,

(Signature) .....

(Name) .....

This **Affidavit** is filed by Stuarts Walker Hersant, Attorneys-at-Law for the Applicant whose address for service is 4th Floor, Cayman Financial Centre, 36A, Dr. Roy's Drive, P.O. Box 2510 GT, George Town, Grand Cayman, KY1-1104 Cayman Islands. Ref: **CL/4672**